Supreme Court, U.S.
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No. 00-526

In the Supreme Court of the United States

GEHAD GABER TAWFIK, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals erred in denying petitioner's motion to reopen on the ground that he had twice provided the government false information in his efforts to avoid deportation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Bull v. *INS*, 790 F.2d 869 (11th Cir. 1986)	5
INS v. *Bagamasbad*, 429 U.S. 24 (1976)	6
INS v. *Rios-Pineda*, 471 U.S. 444 (1985)	5
Skutnik v. *INS*, 128 F.3d 512 (7th Cir. 1997)	7

Statutes:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546:	
§ 309(a), 110 Stat. 3009-625	6
§ 309(c)(1), 110 Stat. 3009-625	6
§ 309(c)(4), 110 Stat. 3009-626	6
§ 309(c)(4)(E), 110 Stat. 3009-626	6, 7
§ 349, 110 Stat. 3009-639	6
8 U.S.C. 1101(f)(3) (1994 & Supp. II 1996)	2
8 U.S.C. 1182(a)(2)(A) (1994 & Supp. II 1996)	2
8 U.S.C. 1182(a)(2)(A)(i)(I)	4, 5
8 U.S.C. 1182(a)(6)(C) (1994 & Supp. II 1996)	5
8 U.S.C. 1182(h)	3
8 U.S.C. 1182(i) (1994 & Supp. II 1996)	4
8 U.S.C. 1254(e)(1)	2
8 U.S.C. 1255(a)	4

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 213 F.3d 646 (Table). The decisions of the Board of Immigration Appeals (Pet. App. 3a-7a) and the immigration judge (Pet. App. 8a-13a) are unreported.

JURISDICTION

The court of appeals entered its order on April 13, 2000. A petition for rehearing was denied on July 13, 2000 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on October 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Egypt. Pet. 3; Pet App. 3a. In September 1989, petitioner became a conditional lawful permanent resident of the United States based on his marriage to Cheryl Webb, a United States citizen. Pet. 3. Five months later, petitioner and his wife were divorced. Pet. App. 9a. Nevertheless, in July 1991, petitioner petitioned the Immigration and Naturalization Service (INS) to remove the conditional basis of his lawful permanent resident status. In the documents he filed with the INS, petitioner represented, under penalty of perjury, that he and Ms. Webb were still married. *Ibid.* The INS subsequently approved the petition. Pet. 4.

When petitioner filed for naturalization, the INS discovered petitioner's falsehood and placed him in deportation proceedings. Pet. 4. Petitioner conceded deportability and requested a discretionary grant of voluntary departure in lieu of deportation. The immigration judge denied voluntary departure. Pet. App. 8a-13a. The immigration judge reasoned (*id.* at 11a) that petitioner's false representation to the INS about his marital status rendered him ineligible for voluntary departure because only persons "of good moral character for at least five years immediately preceding [the] application," 8 U.S.C. 1254(e)(1), are eligible for voluntary departure. See also 8 U.S.C. 1101(f)(3), 1182(a)(2)(A) (1994 & Supp. II 1996). The immigration judge found that petitioner had admitted committing the essential elements of perjury on his application for permanent legal resident status in July 1991 and that perjury was a crime of moral turpitude that precluded finding him to be a person of "good moral character" eligible for voluntary departure. Pet. App. 11a-12a.

2. Petitioner appealed to the Board of Immigration Appeals (Board). While that appeal was pending, petitioner submitted a new application for adjustment of status to conditional lawful permanent resident on the basis of his recent marriage to another United States citizen. On that application, petitioner stated, under penalty of perjury, that he had never knowingly committed any crime of moral turpitude for which he had not been arrested. Pet. App. 4a, 7a. Petitioner then filed a motion to reopen with the Board, seeking vacatur of the immigration judge's decision and a remand for consideration of his new application for conditional permanent resident status. *Id.* at 4a.

The Board affirmed the decision of the immigration judge and denied the motion to reopen. Pet. App. 3a-7a. The Board agreed with the immigration judge's ruling that petitioner's false representation about the status of his first marriage rendered him statutorily ineligible for a grant of voluntary departure. *Id.* at 4a-6a. The Board also rejected petitioner's argument that the immigration judge should have considered a waiver of inadmissibility, under 8 U.S.C. 1182(h), because petitioner had never applied for such relief. Pet. App. 6a.

The Board denied the motion to reopen on two grounds. First, the Board ruled that reopening was not warranted because petitioner's concealment of his divorce from his first wife rendered him inadmissible to the United States, and thus prima facie ineligible for an adjustment of status. Pet. App. 6a. Second, the Board ruled that it would not in any event grant reopening as a matter of discretion, because petitioner had "again misrepresented the facts in completing his most recent application for adjustment of status, wherein he denied that he ever knowingly committed any crime of moral turpitude for which he had not been arrested." *Id.* at

7a. The Board reasoned that petitioner's "demonstrated willingness to repeatedly provide false information when seeking to obtain immigration benefits" outweighed the limited equities in petitioner's favor that arose from his marriage, which occurred "after the commencement of deportation proceedings, with knowledge that the alien might be deported." *Ibid.*

4. The court of appeals affirmed the Board's decision without opinion. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that this Court should grant review because the Board erred in declaring him statutorily ineligible for adjustment of status and denying his motion to reopen on that basis. That claim does not merit review.

First, petitioner's argument is incorrect. Petitioner does not dispute that he made false representations to the INS, under oath, both on his initial application for adjustment of status based on his defunct first marriage and on his subsequent application for conditional permanent legal resident status based on his second marriage. See also Pet. App. 5a n.3 (record shows petitioner's "clear employment of deception in an effort to obtain immigration benefits"). Because petitioner's admitted behavior establishes the "essential elements" of perjury, the Board correctly concluded that petitioner was inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I), and thus statutorily ineligible for an adjustment of status. See 8 U.S.C. 1255(a) (alien must be admissible to be considered for adjustment).

Second, petitioner's argument that his inadmissibility could have been waived under 8 U.S.C. 1182(i) (1994 & Supp. II 1996) was not presented to either the immigration judge or the Board. Cf. Pet. App. 6a (rejecting

"vague reference" to waiver under a different statutory provision because petitioner never applied for such relief). Furthermore, that waiver provision applies only to findings of inadmissibility based on the misrepresentations identified in 8 U.S.C. 1182(a)(6)(C) (1994 & Supp. II 1996). Petitioner was not found inadmissible under that provision. He was found inadmissible on the ground that he admitted the essential elements of a crime of moral turpitude, under subsection (a)(2)(A)(i)(I). The waiver provision is thus inapplicable to petitioner's case.[1]

Third, the Board made clear that, even were petitioner statutorily eligible for adjustment of status, it would deny reopening in the exercise of its discretion. The Board found that petitioner's second incident of false representation—when he denied his prior commission of perjury in his current application for adjustment of status—made a discretionary denial of reopening appropriate. Thus, even if legal error occurred in denying reopening based on petitioner's ineligibility for adjustment of status, the court of appeals' judgment affirming the denial of reopening remains correct because the Board acted well within its discretion in ruling that petitioner's repeated falsehoods outweighed the limited equities in favor of reopening. See *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985) (INS has "broad discretion" to grant or deny motions to reopen, and "if

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[1] Petitioner's reliance (Pet. 8) on *Bull* v. *INS*, 790 F.2d 869 (11th Cir. 1986), is misplaced. The alien in *Bull*, unlike petitioner, had specifically requested consideration of waiver before the immigration judge and the Board. See *id.* at 873 n.3. Nor did the alien's crime of moral turpitude in *Bull* (passing a bad check) occur in the course of attempting to obtain immigration benefits, as petitioner's did. In any event, an alleged intra-circuit conflict does not warrant this Court's review.

the Attorney General decides that relief should be denied as a matter of discretion," statutory eligibility requirements need not be considered); *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976) (per curiam) (Board or immigration judge may deny applications in the exercise of discretion without addressing statutory eligibility questions).

2. Petitioner also contends (Pet. 11-13) that this Court should exercise its supervisory power because petitioner "theorizes" (Pet. 11) that the Board found him statutorily ineligible for adjustment of status so that it could avoid addressing the retroactivity of Section 349 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-639. That amendment makes it more difficult for aliens to establish their eligibility for waiver of inadmissibility based on prior misrepresentations. The Board's failure, however, to address an argument that petitioner failed properly to raise and that would have made it *more difficult* for petitioner to obtain relief (see Pet. 11) does not warrant this Court's review. In any event, the Board's failure to consider the waiver provision *sua sponte* does not present a question of broad or enduring legal importance that merits an exercise of this Court's certiorari jurisdiction.[2]

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[2] Petitioner also ignores the fact that the Board denied his motion to reopen on the alternative and independent ground that reopening would not be warranted as a matter of discretion. Pet. App. 7a. Because petitioner was placed in deportation proceedings before IIRIRA's general effective date of April 1, 1997, see IIRIRA § 309(a), 110 Stat. 3009-625, and because the Board's final order was issued after October 31, 1996, IIRIRA's transitional judicial-review provisions apply. See IIRIRA § 309(c)(1) and (4), 110 Stat. 3009-625, 3009-626. Section 309(c)(4)(E) of IIRIRA's transition rules provides that "there shall be no appeal of any

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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discretionary decision under section * * * 245 of the Immigration and Nationality Act," 110 Stat. 3009-626. As the government argued in seeking dismissal by the court of appeals, that Section appears to bar judicial review of the Board's discretionary denial of petitioner's motion to reopen so that he could apply for relief under Section 245 of the Immigration and Nationality Act. See *Skutnik* v. *INS*, 128 F.3d 512, 514 (7th Cir. 1997) (finding no jurisdiction to review discretionary denial of suspension of deportation).